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No. 04-631

IN THE

Supreme Court of the United States

JOAN WAGNON,
in her official capacity as
Secretary, Kansas Department of
Revenue
Petitioner,

v.

PRAIRIE BAND POTAWATOMI
NATION,
Respondent

On Petition for a Writ of
Certiorari to the United States
Court of Appeals for the Tenth
Circuit

AMICI CURIAE BRIEF OF HOOPA VALLEY TRIBE AND COLORADO RIVER INDIAN TRIBES ON BEHALF OF RESPONDENT PRAIRIE BAND POTAWATOMI NATION REGARDING VALUE GENERATED ON RESERVATION

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The Hoopa Valley Tribe and the Colorado River Indian Tribes submit this *amici curiae* brief on behalf of the Respondent Prairie Band Potawatomi Nation seeking to affirm the decision of the United States Court of Appeals for the Tenth Circuit. This brief exclusively adds factual context for the concept of 'value generated on the reservations by activities in which the Tribes have a significant interest.' Pursuant to Supreme Court Rule 37(3)(a), this brief is filed with the written consent of all parties.[1]

INTEREST OF THE AMICI CURIAE

The Hoopa Valley Tribe and the Colorado River Indian Tribes (collectively "Tribes") are federally recognized sovereign Indian tribes. Each tribe generates value in producing sand, rock and ready mix cement derived from natural resources on their respective reservations. Reservation lands are the source of gravel and similar minerals which the Tribes seek to refine and market as part of their efforts to create employment opportunities and build reservation economies.

The Colorado River and the Trinity and Klamath Rivers flow through the *amici* Tribes' reservations. The ancestral home of the Hoopa Valley Tribe, established as an Indian reservation in 1864, is located in northwestern California between the Coast Ranges and the Salmon-Trinity Alps Wilderness Area. The Reservation is remote, but has sizable stands of commercial timber. The Tribe and the federal government bear all timber management and harvest burdens.

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[1] In compliance with Supreme Court Rule 37(6), *amici curiae* represent that no counsel for any party authored this brief in whole or in part, and that no person or entity other than *amici curiae* or their counsel, made a monetary contribution to the preparation or submission of this brief.

The Hoopa Valley Tribe has also financed, constructed and is operating a plant to build modular housing units, which it markets both on and near its reservation. The Colorado River Indian Reservation lies mostly in Arizona, but encompasses land on both sides of the Colorado River in Arizona and California. The Reservation was established in 1873 for the Mojave and Chemehuevi Indians of the lower Colorado River. The Tribes, county, state and federal government all fund various public services on the Reservations.

The Tribes urge the Court to affirm the importance of the "value generated on reservations" inquiry as a means to preempt unlawful state taxes as applied to Indian tribes. The Court should refrain from adopting the ill-conceived sweeping "bright-line" test requested by the Petitioner state of Kansas and its *amici*. *See Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) (rejecting "bright-line" legal incidence rule in favor of particularized balancing when judging validity of state tax under the Commerce Clause). The Court should continue to evaluate and protect strong tribal interests in shielding value generated on reservations from unlawful state exactions on a case-by-case basis, as was appropriately done in the decision below.

SUMMARY OF ARGUMENT

The "value generated on reservations" inquiry is a valid and important balancing test that has been applied and refined by the Courts of Appeals for the Ninth and Tenth Circuits over the past two decades. The doctrine of reservation generated value is central to a particularized injury approach to evaluating state taxes as applied to Indian tribes. In the instant case, the Tenth Circuit properly applied the facts within the framework of the "value generated on reservations" inquiry and held that

the state of Kansas' motor fuel tax as applied to Respondent Prairie Band Potawatomi Nation's fuel sales is unlawful.

Value generated on Indian reservations takes several forms and must be given proper weight in a particularized inquiry into the nature of the state, federal and tribal interests at stake in each case. The particularized "value generated on reservations" inquiry works, and worked as was intended in the court of appeals below.

ARGUMENT

I. THE "VALUE GENERATED ON RESERVATIONS" INQUIRY IS WELL-FOUNDED AND SHOULD NOT BE DISTURBED.

Principles concerning value generated on Indian reservations have been clearly delineated in case law since the inception of the doctrine in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 156-57 (1980). In this path making decision, the Court explained the "value generated on reservations" inquiry as follows:

> The principle of tribal self-government, grounded in notions of inherent sovereignty and in congressional policies, seeks an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other. [Citation omitted]. While the Tribes do have an interest in raising revenues for essential governmental programs, that interest is strongest when the revenues are derived from value generated on the reservation by activities

> involving the Tribes and the taxpayer is the recipient of tribal services.

Id. In reliance on this doctrine, courts below, especially in the Ninth and Tenth Circuits, have elucidated appropriate factors that bring the Court's principles to life and provide a guiding framework for tribes and states to follow when addressing taxes implicating "activities involving the Tribes."[2]

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[2] *See, e.g., Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995); *Dep't of Taxation and Finance of N.Y. v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 64 (1994); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 233 (1989); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 341 (1983); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 138 (1982); *Central Machinery Co. v. Ariz. State Tax Comm'n*, 448 U.S. 160, 169 (1980); *Agua Caliente Band of Cahuilla Indians v. Hardin*, 223 F.3d 1041, 1045 (9th Cir. 2000); *Sac and Fox Nation of Missouri v. Pierce*, 213 F.3d 566, 585 (10th Cir. 2000); *Gila River Indian Community v. Waddell (Gila River II)*, 91 F.3d 1232, 1236 (9th Cir. 1996); *Salt River Pima-Maricopa Indian Community v. Ariz.*, 50 F.3d 734, 736 (9th Cir. 1995); *Seneca-Cayuga Tribe of Okla. v. Okla.*, 874 F.2d 709, 713 (10th Cir. 1989); *Indian Country U.S.A. v. Okla. Tax Comm'n*, 829 F.2d 967, 986 (10th Cir. 1987); *Cabazon Band of Mission Indians v. County of Riverside*, 783 F.2d 900, 906 (9th Cir. 1986); *Squaxin Island Tribe v. Wash.*, 781 F.2d 715, 720 (9th Cir. 1986); *Queets Band of Indians v. Wash.*, 765 F.2d 1399, 1408 (9th Cir. 1985); *Kerr-McGee Corp. v. Navajo Tribe of Indians*, 731 F.2d 597, 599 (9th Cir. 1984); *Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1571 (10th Cir. 1984).

The oft-applied balancing test neither favors tribes nor states. Rather, the specific facts appropriately determine whether the state tax stands or falls. For instance, in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 219 (1987), the Court invalidated a state regulation emphasizing that the tribes had built modern facilities, provided recreational opportunities and services, and giving weight to these important tribal interests. Likewise, in *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430 (9th Cir. 1994), the Court discerned a substantial tribal investment in the tribes' off-track wagering facility while noting that some value stemmed from horse races off-reservation. In contrast, in *Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107 (9th Cir. 1997), the Court concluded that the tribe contributed little to the value of the products and services sold at the hotel and failed to show that it had an active role in the creation of the value taxed.[3] As these cases aptly demonstrate, the particularized interests balancing test fairly addresses the weight accorded tribal interests where value is generated on reservations by activities in which Indian tribes have a significant interest. The inquiry is fair and reasonable, taking into account both the tribes and the states' interests.

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[3] *See also Dep't of Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 73 (1994) (The tax regulation "which falls on non-Indian purchasers of goods that are merely retailed on a reservation -- stands on a markedly different footing from a tax imposed directly on Indian traders, on enrolled tribal members or tribal organizations, or on 'value generated on the reservation by activities involving the Tribes,' *Colville*, 477 U.S., at 156-57.").

II. "VALUE GENERATED ON RESERVATION" IS ESPECIALLY IMPORTANT IN THE CONTEXT OF NATURAL RESOURCES.

The importance and continuing necessity of the balancing inquiry is highlighted in the context of natural resources. Natural resource value generated on reservations represents a cornerstone of economic development for numerous Indian tribes across the West, including the *amici* tribes. States should not be able to tax such value merely by arbitrarily placing the incidence of the tax on an off-reservation party. One illustration of the "value generated on reservations" inquiry regarding natural resources is *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657 (9th Cir. 1989), *cert. denied*, 494 U.S. 1055 (1990). *See also Crow Tribe of Indians v. Montana,* 650 F.2d 1104 (9th Cir. 1981) ("*Crow I*"), *amended* 665 F.2d 1390 (1982) (holding that because coal from the reservation and adjacent areas was a component of the land, the tribe was not marketing a tax exemption); *Crow Tribe of Indians v. Montana,* 819 F.2d 895, 899 (9th Cir. 1987) ("*Crow II*") (holding that state taxes imposed on a non-Indian lessee were preempted because the coal "lease brings revenue that represents value generated by tribal activities and in which the tribe has a substantial interest"), *aff'd* 484 U.S. 997 (1988).

In *Nevins*, the Hoopa Valley Tribe successfully challenged the California timber yield tax, a tax imposed on "the first non exempt person" to acquire legal or beneficial title to the timber. The State applied the tax to private companies who purchase tribal timber directly from the Bureau of Indian Affairs or from the tribal enterprise. Cal. Rev. & Tax Code § 38104 (1989); Cal. Adm. Code Pub. Rev. R. 1026 (1989). The yield tax is normally assessed at the time of harvest on the value of the timber. Both the district court and the court of appeals sided with the Tribe to preempt the state yield tax that

had, in 1976, replaced the state of California's *ad valorem* tax on timber.

In conducting the particularized inquiry into the nature of the state, federal and tribal interests at stake in the case, the court of appeals noted that "State taxes or regulations that interfere with tribal activities may be preempted if the tribal activity the state seeks to affect involves goods produced on the Reservation." *Nevins*, 881 F.2d at 659. Although the State's interest in imposing the tax on off-reservation lumber mills was considered in the court's particularized inquiry, that interest was judged insufficient to outweigh the strong federal and tribal interests at stake. *Id.* at 660-61 (finding that the state's "general interest in revenue collection is insufficient to outweigh the specific federal and tribal interests with which the timber yield tax interferes").

One of the numerous benefits of the value generated on reservations inquiry is the test's ability to fairly consider and respond to myriad tax situations. Indian tribes are involved in generating value through natural resource extraction, manufacturing, financial services, software development, and entertainment. For instance, the *amici* tribes generate value by, *inter alia,* producing sand, rock and ready-mix cement on their reservations derived from the resources that their lands provide. Other Indian tribes create value through other goods and services; in the instant case of the Respondent Prairie Band Potawatomi Nation, through reservation fuel sales and related services.

The scope of the goods and services created and marketed on the reservation is as unique and varied as the tribes and the lands they call home. So too are the state taxes at play. There is no compelling reason to eschew judicial fact-finding in Indian tax cases such as this to achieve vague

notions of predictability. As this Court concluded in *Complete Auto*, a bright-line test that looks only to the legal incidence of a tax to adjudicate tax matters "has no relationship to economic realities. Rather, it stands only as a trap for the unwary draftsman." *Complete Auto*, 430 U.S. at 279. Practical effects of a tax are to be considered. *Id.* at 278. Legal incidence bright-line rules "serve[] only to distract the courts and parties from their inquiry into whether the challenged tax produced results forbidden by the Commerce Clause." *Id.* at 285. A particularized inquiry into the nature of the state, federal and tribal interests at stake in each case is necessary to fairly consider the unique attributes of economic development implicated and to preserve the preemptive effect of the Indian Commerce Clause and federal law.

Indeed, Title 25 of the United States Code contains a patchwork of statutes regulating tribal reservation physical resources and promoting enterprises to sustain these unique outposts of tribal culture and self-government. *See, e.g.*, 25 U.S.C. § 1451 (financing economic development), § 2101 (developing tribal mineral resources), § 3501 (Indian energy resources). If states are able to capture the market value generated on Indian reservations simply by shifting the incidence of taxation to a non-exempt person, then they will have frustrated the preemptive effect of federal law and the intent of Congress to promote tribal self-sufficiency through laws that promote and regulate commerce on Indian reservations.[4] No simplistic bright-line test based upon the

[4] The tax exempt nature of goods whose value is generated on reservations is recognized in some states and should not be disturbed. *E.g.*, California, 18 C.C.R. § 1616(d)(3)(A) (2005) (meals, food or beverages sold for consumption on the reservation); Washington, WAC § 458-20-192(7)(a)(i) (2005) (food, arts and crafts), § 458-20-192(7)(c) (describing appropriate balancing test for value generated on the reservation).

incidence of taxation can fairly accommodate the many federal, tribal and state interests that arise in tax cases.

CONCLUSION

This Court should affirm the judgment of the Tenth Circuit, and continue to evaluate and protect strong tribal interests in shielding value generated on reservations from unlawful state exactions.

Respectfully submitted,

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